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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 455

PHILIP WEISS, PETITIONER

v.

JAMES W. JOHNSON, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals for the Second Circuit (R. 417-423) is reported at 206 F. 2d 350.

JURISDICTION

The judgment of the Court of Appeals (R. 423-424) was entered August 19, 1953. The petition for a writ of certiorari was filed November 3, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the courts below erred in sustaining the jury's finding that a division of the profits of a family partnership was not a *bona fide* and reasonable one as related to the services and capital contributed by the respective partners, and that a portion of the profits allocated to two of the taxpayer's daughters was derived from taxpayer's capital and therefore includible in his gross income as defined in Section 22(a) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business

carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated

organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3797.)

STATEMENT

This action was brought in the District Court for the Southern District of New York by Philip Weiss (the taxpayer) against James W. Johnson, Collector of Internal Revenue, for what was then known as the Third Collection District of New York, for recovery of amounts aggregating $82,916.27, alleged to have been erroneously collected from him as federal income taxes and interest for the years 1943 and 1944. (R. 2-6.) The case was tried to a jury (R. 1), which rendered a verdict for the Collector and denied recovery (R. 317). Judgment on the verdict was entered for the Collector, with costs (R. 412), and taxpayer appealed (R. 413). The judgment was affirmed by the Court of Appeals. (R. 423-424.)

The issues presented to the jury by the instructions of the trial court (R. 297-313) were (1) whether the taxpayer had borne the burden of proving that he had in fact overpaid his income tax for the years at issue as alleged, (2) whether the taxpayer had proved the *bona fides* of an alleged part-

nership purportedly formed in June, 1942, composed of himself and members of his immediate family, and also the *bona fides* of a prior purported partnership entered into on December 1, 1941, by the taxpayer and his three daughters, together with one Henry Grubel and his daughter (individually and as trustee), to conduct a business which theretofore had been conducted by a corporation all of the stock of which was owned by those entering into the 1941 partnership, and (3) if these partnerships were *bona fide,* whether the agreed division of profits among the several partners was a reasonable and *bona fide* one.

The evidentiary facts are set forth in the opinion of the Court of Appeals. (R. 417-423.) Briefly, the taxpayer was engaged in the textile manufacturing business from 1929 to 1941 with Henry Grubel in a corporation named Plaza Mills, Inc., owned by them and their families. The corporation was dissolved on December 1, 1941, and a limited partnership of the former stockholders was formed to operate the business. The taxpayer and Grubel were general partners, with Grubel's daughter, Irene (individually and as trustee), and the taxpayer's three daughters, Miriam, Helen, and Beatrice, as limited partners. This partnership was dissolved as of June 7, 1942, upon the death of Henry Grubel; a new limited partnership was formed of the Weiss family only, who bought out the Grubel interests. The general partners were the taxpayer; his son-in-law, Bernard Krosney (husband of Miriam); and his son-in-law, Samuel Sunshine (hus-

band of Helen). The limited partners were the three daughters, Miriam, Helen, and Beatrice. This partnership operated the business until it was sold in 1944. (R. 418.)

The certificate of the limited 1942 partnership purported to state the contributions of the limited partnership thus: Miriam, $21,900; Helen, $43,-957.36; Beatrice, $65,957.35; and the share of profits each was to receive by virtue of her contribution was: Miriam 10%; Helen 15%; Beatrice 20%. The remainder of the partnership agreement was oral. The total capital contribution of the partners as computed by Revenue Agent Clines, who recommended assessment of the additional tax which is the subject of the present suit, was $340,561.34, of which the taxpayer's interest acquired on dissolution of the prior partnership was $202,746.63, while Bernard and Samuel each contributed $3,000, and the daughters contributed the amounts set out above. (R. 418.)

Taxpayer was receiving a salary of $20,000 a year, while Bernard and Samuel each was receiving $7,500. Although Beatrice gave her full time to the business, she was only 22 and in 1942 was paid no salary. After the above stated percentages of profits to the daughters (totaling 45%), the remaining 55% was divided 40% to the taxpayer, 10% to Bernard, and 5% to Samuel. (R. 419.)

Revenue Agent Clines testified that the active conduct of the business was by Bernard, Samuel, and Beatrice, the taxpayer acting only in an advisory capacity, because he desired to retire for age

and illness. Since Revenue Agent Clines considered capital to be the important factor, he adjusted the limited partners' distribution of profits to conform with their proportionate share of the total capital invested in the business. And as the responsibility of the operation and management rested upon the two general partners, Bernard and Samuel, he proposed a salary to each of $15,000 a year, plus 2% of the profits after salary (instead of the approximately 1% each contributed to the invested capital). Hence, his revised distribution of profits was (after deduction of salaries of $30,000 a year) as follows: the taxpayer, 58%;[1] Bernard, 2%; Samuel, 2%; Miriam, 6%; Helen 13%; Beatrice, 19%. Except for the slight variation in the percentages to Bernard and Samuel, these percentages corresponded closely to the partners' percentage contributions to invested capital. (R. 419.)

This recommendation was adopted by the Commissioner and applied to net income of $326,633.34 for 1943, and $176,680.74 for 1944. The total amount of additional taxes for the two years assessed against the taxpayer, with interest, was $82,916.27, while the total overassessment in favor of the other members of his family was about $53,000, which, with their consent, was applied against the assessment against the taxpayer. He paid the balance. Although he originally sued for the full amount assessed against him, he reduced his claim at the

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[1] As noted above, taxpayer's percentage share was 40% under the division previously made by the partnership.

trial to the amount he had actually paid in cash, namely, $29,774.99. (R. 419.)

ARGUMENT

1. In affirming the District Court and refusing to disturb the jury's verdict, the court below did not depart from the reasoning of this Court in *Commissioner* v. *Culbertson,* 337 U.S. 733; *Commissioner* v. *Tower,* 327 U.S. 280; and *Lusthaus* v. *Commissioner,* 327 U.S. 293. In the *Culbertson* case, the Court, reaffirming its holdings in *Tower* and *Lusthaus,* held that whether a family partnership is entitled to recognition for federal income tax purposes depends upon whether (p. 742) "considering all the facts * * * the parties in good faith and acting with a business purpose intended to join together" as partners. This question, said the Court (p. 743), is one of ultimate fact for the trial tribunal, no single factor being conclusive. Reversing the decision of the Court of Appeals, which had overturned that of the Tax Court, it remanded the case to the Tax Court for a determination of whether the parties had (p. 748) a "bona fide intent" to be partners, either because of services or because of contributions of capital of which they were the true owners. In remanding the case, the Court stated (p. 748) that "No question as to the allocation of income between capital and services is presented in this case," and it accordingly refrained from expressing any opinion on that question.

While there was no occasion in *Culbertson* to pass upon the allocation question, the court below cor-

rectly observed (R. 421-422) that the fundamental principles there applied, in determining whether the parties to a family partnership agreement are entitled to recognition as partners for tax purposes, also apply with full force where the partners are entitled to recognition as such, but agree upon a division of the profits which is patently disproportionate to their respective contributions of capital and services, or is otherwise not *bona fide*. A deflection of the income of a family partnership from one partner to another is no more tolerable under the principles of the *Culbertson* line of cases than the deflection of the income of a sole proprietorship to a claimed partner. That members of a taxpayer's family are his partners by virtue of a contribution of *some* capital or services does not preclude an inquiry by the taxing authority into whether the shares of the total business income reported by them in their tax returns have been fixed in good faith and bear a reasonable relationship to their respective contributions. We know of no case challenging this principle. The very cases relied upon by taxpayer for conflict (Pet. 8, 14-15) recognize the authority of the Commissioner to challenge the *bona fides* and reasonableness of the agreed division of income.

Moreover, the general principle was properly applied here. The Commissioner determined that taxpayer and two of his daughters, who contributed only capital and no services, were ascribed portions of the earnings of the family partnership which bore no reasonable relationship to

their contributions. After paying the resulting deficiency in income tax, taxpayer sued for a refund. The case was tried before a jury, and extensive testimony was taken in a four-day trial. The District Court correctly instructed the jury (R. 420) that in order to obtain a refund taxpayer had the burden of showing that a *bona fide* partnership existed and also that the agreed division of profits "was a bona fide and reasonable one, taking into account all the facts and circumstances." The jury found against the taxpayer, and a summary of the evidence recited by the court below shows (R. 418-420), as the court held (R. 420), that "there was ample evidence to support the jury's verdict." Under the circumstances, the District Court properly refused to set aside the verdict, and the court below correctly affirmed its decision.

2. Each case in this field turns as it must on its own facts, and the cases with which taxpayer asserts conflict (Pet. 8, 14-16) are readily distinguishable on their facts. In each of them the court of appeals reversed the Tax Court's finding that the agreed allocation of the profits was unreasonable, on the ground that the finding was clearly erroneous in the light of all the evidence. In each instance, however, the appellate court properly acknowledged that such a finding was a permissible one if supported by the record. Thus in *Woosley* v. *Commissioner* 168 F. 2d 330 (C. A. 6th), the court was careful to point out (p. 333) that "Situations may be presented in which the Tax Court might properly make allocations of income in husband and

wife partnership cases; but, on its facts, this case is not one of that kind." See also *Canfield* v. *Commissioner,* 168 F. 2d 907, 913 (C. A. 6th). Again, in *Hartz* v. *Commissioner,* 170 F. 2d 313 (C.A. 8th) certiorari denied, 337 U.S. 959, the court also took pains to point out that in reversing the Tax Court (p. 318) "we do not mean to say that a division of income between alleged partners must necessarily be adhered to for tax purposes merely because it is written into an alleged partnership agreement," and that "If such a division is artificial" it could be disregarded by the Commissioner and the Tax Court. In *Marcus* v. *Commissioner,* 201 F. 2d 850 (C.A. 5th), no question of allocation was presented, but the court stated (p. 853) that under the *Culbertson* decision an allocation agreed upon by the parties was binding "if made by them in good faith, that is as a reality and not as a sham." *Dorzback* v. *Collison,* 195 F. 2d 69 (C.A. 3d), with which taxpayer also asserts conflict (Pet. 15-16), did not involve a family partnership; the question presented was the deductibility of interest paid by the borrower-husband to the lender-wife. Cf. *Sommers* v. *Commissioner,* 193 F. 2d 609, rehearing denied, 195 F. 2d 680 (C.A. 2d), which is in accord with the decision below (see R. 421-2).

In this case, not only is there "ample evidence" to support the jury's verdict that the agreed division of the profits was not a *bona fide* and reasonable one (R. 420), but also, since the case was tried before a jury, the scope of appellate review is more limited than in the cases relied upon by taxpayer,

where the facts were found by the Tax Court. What is more, since this is a suit for refund of taxes alleged to have been erroneously collected, taxpayer was under a heavier burden of proof than in cases where a taxpayer seeks a Tax Court review of a deficiency determination. *Lewis* v. *Reynolds,* 284 U.S. 281; *Stone* v. *White,* 301 U.S. 532.

3. Even assuming that a conflict does exist, recent legislation has rendered it academic with respect to taxable years after 1950. Section 191 of the Internal Revenue Code, added by Section 340(b) of the Revenue Act of 1951, c. 521, 65 Stat. 452, provides that the distributive share of a donee (or vendee) member of a family partnership is nevertheless to be taxed to the donor partner to the extent that the share is determined without first deducting reasonable compensation for the donor's services, or to the extent that it is disproportionate to the donee's capital contribution.[2] Moreover, while Section 340(c) of the 1951 Act makes this new section applicable to taxable years after 1950, it also provides that determinations for prior years shall be made "without inferences drawn from the fact that this section is not expressly made applicable" to prior years. See also Mim. 6767, 1952-1 Cum. Bull. 111.

4. Contrary to taxpayer's assertion (Pet. 20),

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[2] As the court below noted in a footnote to its opinion (R. 422), much of the daughters' contributions came to them by gift from taxpayer, and had the taxable year here involved been 1951 or a later year this new provision would have explicitly authorized reallocation of the partnership income.

this case does not present issues of general importance meriting this Court's attention. As just indicated, recent legislation has largely disposed of the allocation problem in family partnership cases, at least with respect to taxable years after 1950. With respect to prior years, the guiding principles have already been laid down by the Court in the *Tower, Lusthaus* and *Culbertson* cases, and each case necessarily turns on its own facts. As for the additional questions which taxpayer alleges are involved (Pet. 2-3), they are merely incidental to the allocation question and the answers likewise depend upon the particular facts of this case. The jury having determined the issues against the taxpayer, and both lower courts having concurred in sustaining the jury's verdict, the case presents no occasion for issuance of the writ.

CONCLUSION

The decision below is correct, and the case does not call for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1953.

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HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 455

PHILIP WEISS,

Petitioner,

against

JAMES W. JOHNSON, Collector of Internal Revenue.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

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PHILIP WEISS,

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JAMES W. JOHNSON, Collector of Internal Revenue.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER

Respondent, in his brief, seeks to avoid the issue of law presented in this case by ignoring it. The Commissioner of Internal Revenue, without any legislative enactment, has seized the power to reallocate the profits of a bona fide partnership between capital and services. He now seeks the confirmation thereof by this Court. He does so, in effect, by requesting this Court to deny petitioner's application for a writ of certiorari. By such denial, this Court would, without any consideration of the question grant him such power by judicial legislation, for this Court left unanswered the precise question at the close of *Commissioner* v. *Culbertson,* 337 U. S. 733, where, at p. 748, this Court stated:

> "No question as to the allocation of income between capital and services is presented in this case and we intimate no opinion on that subject."

On audit of the partnership return in 1948, prior to the *Culbertson* decision, the Commissioner asserted his claimed power to change the agreement of the partners in this bona fide partnership by making capital the sole criterion and reallocated the profits approximately according to the precentage of capital contribution of the partners (R. 340). The *Culbertson* decision having intervened before the trial of the case below, the Commissioner, by the opinion evidence and exhibits which he presented, calculated to bring before this Court for review the very question referred to above and left unanswered by this Court. Now, having been successful below, respondent disregards the issue of the Commissioner's power by framing the "Question Presented" (Resp. 2) as (a) Was the division of profits bona fide and reasonable; and (b) Whether the profits allocated to Miriam and Helen were derived from petitioner's capital?

By so framing the question presented, respondent seeks denial of petitioner's application for a writ, on the ground that this Court should not review the evidence. *The distinction that respondent overlooks is, that the opinion testimony and exhibits complained of (Ex. P, Q, R; R. 402-411), admitted in evidence, were irrelevant and posed the wrong question to the jury, namely, "reasonableness of return on capital invested", instead of "reasonableness of the agreed division of profits."*

Our petition refers in detail to the immaterial and irrelevant hindsight exhibits submitted for consideration of the jury, such as Exhibit P (R. 402-404), in which the percentage return on capital invested was substituted as the test of the reasonableness of the division of profits. If only on hindsight, after the taxable years in question

were closed and the returns filed and the parties' success measured, could the percentage of return on capital invested be determined, then how can partners, in making an agreement at the inception of the partnership, be imposed upon by law to use the end result as the basis for their agreement? If the test will be the reasonableness of the return on capital invested rather than the reasonableness of the division of profits, then the parties will be penalized for the success of their endeavors. If this partnership had only earned $35,000.00, which would have been only sufficient to pay petitioner's salary and that of Bernard and Samuel, Exhibit P (R. 402-404) would be meaningless.

There is no doubt, as stated in *Hartz* v. *C. I. R.*, 8 Cir., 170 F. 2d 313, and other cases, that if a division of profits is artificial and unwarranted for want of good faith or absence of proper reasons therefor, then that fact might constitute sufficient ground for a finding that the alleged partnership was a sham or a device to avoid the payment of taxes. *But does the Commissioner of Internal Revenue have the power to rewrite the partners' agreement as to the division of profits where there is no "wholly unreasonable agreement as to the sharing of partnership income"?* The question is not unlike the situation in which a court of equity may step in because of an unconscionable advantage taken by one party to a contract. But before the court would move, it would have to be convinced that there had been such a gross inequity done as to shock the conscience of the court. What have we here? The changes made by the Commissioner of Internal Revenue were "slight" (Resp. 7) in each partner's agreed share of the partnership profits; we urge so slight, as on its face to raise a restraining hand against the Commissioner's interference. Adding the changes made by the Commissioner in the shares of all five of petitioner's partners, the result was a total of only 18%. So completely ridiculous is the position of the Commissioner on his claim of a "patently disproportionate" division of

the profits that his change of only 1% respecting the limited partner, Beatrice (who invested capital and rendered services unpaid for) is completely glossed over! It is petitioner's position that an unwarranted change in the division of profits of even only one of the partners requires reversal of the judgment. It is for this reason, no doubt, that respondent carefully avoids the issue of the irrelevant testimony admitted on the trial, of "return on capital invested" and Exhibits P, Q and R (R. 402-411). If respondent could succeed in spelling out so gross and unconscionable a contract of partnership so as to warrant a finding of bad faith, then the crucial question, "Has the Commissioner the power to reallocate?", would answer itself by the disallowance of the partnership itself.

A. *Conflict of Circuits.* If the court below had not interpreted its decision in *Sommers* v. *C. I. R.*, 193 F. 2d 609, Reh. 195 F. 2d 680 (which involved a sub-venture agreement and not a family partnership case and which conflicts with other circuits,[1]) as being authority that it had previously inferentially decided that the Commissioner did have the power to reallocate partnership income then, perhaps, the court below would have excluded the highly prejudicial and inflammatory Exhibits P, Q and R (R. 402-411) which were prepared by respondent on that issue.

The Court below overlooked the import of the statement by this Court in *Commissioner* v. *Culbertson*, 337 U. S. 733, where at p. 744 it stated:

> "* * * If upon a consideration of all of the facts it is found that the partners joined together in good faith to conduct a business, having agreed that the service or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient."

[1] *Dorzback* v. *Collison*, 3 Cir., 195 F. 2d 69; *Forman* v. *C. I. R.*, 9 Cir., 199 F. 2d 881.

The cases cited by respondent (with two exceptions[2] not material to the family partnership question) are the cases which petitioner relies on to indicate the conflict of the various circuits.

With respect to the latter half of the "Question Presented" by respondent (Resp. 2), the case of *Levin* v. *C. I. R.*, 2 Cir., 199 F. 2d 692 (11/12/52), indicates the intramural conflict within the very court below for, if applied to the facts in this case as to the limited partners Helen and Miriam who had contributed needed capital, the conflicting reasoning in *Sommers* v. *C. I. R., supra,* would not have applied and Exhibit "Q" (R. 406-409) would have been inadmissible.

No citation is indicated by respondent to support the allowance to Helen and Miriam of a "return of 10% on their capital" (Def. Ex. Q; R. 405-408). Although petitioner's capital contribution was larger than their's, the profit on the sale of the mills (which they had contributed) in 1944 (Pl. Ex. 6, Sch. G, Col. 8; R. 333) and the benefit to petitioner in receiving his 40% partnership share, is the best proof of the value to the partnership of the capital contribution by the children.

Respondent inferentially recognizes the conflict (Resp. 12) and then dismisses the importance thereof for the alleged reason that the enactment of Section 191 of the Internal Revenue Code[3] provides that the donor member of a family partnership be first compensated for his services before distribution to the donees. This argument ignores:

1. Petitioner's sons-in-law, BERNARD KROSNEY and SAMUEL SUNSHINE, were not recipients of any gifts from

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[2] *Lewis* v. *Reynolds,* 284 U. S. 281; *Stone* v. *White,* 301 U. S. 532.

[3] Added by Sec. 340 (b) of the Revenue Act of 1951.

petitioner to enable them to make capital contributions to the partnership.

2. A contribution of capital by these two active and very able general partners was not necessary to substantiate their distributive share of the profits.

3. The agreement of the partners, disregarded by the Commissioner, provided for a salary of $20,000.00 per annum to petitioner, which was disallowed upon audit when capital was the sole criterion in the Commissioner's theory of attack upon this partnership.

4. The 1951 enactment permits only the donor's compensation to be fixed or increased by the Commissioner. No citation is furnished by respondent for doubling the salaries of BERNARD KROSNEY and SAMUEL SUNSHINE from $7,500.00 to $15,000.00 per annum and more than doubling their share of the profits from 9/10 of 1% to 2% if the Commissioner was consistent and used capital as the criterion for division of profits. Revenue Agent CLINES recognized the absence of legal authority for this when he testified as plaintiff's (petitioner herein) witness, at page 198 of the Transcript of Record, as follows:

> "Q. Do you know of any law that gave you the right to give a man a higher salary than has been designated for him? A. No.
>
> Q. There is no law to that effect? A. No."

The Revenue Agent then goes on to say that he "tried to give * * * what I thought was a fair salary." The Assistant Federal Attorney then cross-examined at this point (p. 200-201), as follows:

> "Q. Whether or not there is such a law, increasing the value of the services of Mr. Krosney and Mr. Sunshine, you are acting in accordance with the rulings of the Internal Revenue Bureau? A. Yes."

5. The capital contributions of Helen, Miriam and Beatrice were not all gifts from petitioner, and that part which was received as gifts was not contemporaneous with or incident to the formation of the partnership.

B. *Lack of Legislative Authority for the Assumed Power of the Commissioner.* The only authorities cited by respondent in his brief are Sections 22, 181, 182, 191 and 3797 of the Internal Revenue Code. Not one of these citations grants the Commissioner the power to rewrite the agreement between the parties and, in fact, this Court stated in *Commissioner* v. *Culbertson,* 337 U. S. 733, that its decision is not to be inferred to grant him that power. The only reason apparently for the printing in full in repondent's brief of these Sections is to clothe his argument with a show of legislative sanction.

Mr. Justice Frankfurter, in his concurring opinion in *Commissioner* v. *Culbertson, supra,* properly distinguishes the aforesaid Sections of the Internal Revenue Code in relation to one another. No inference can be drawn that they give the Commissioner the power to rewrite agreements between partners when their relation is bona fide. Mr. Justice Frankfurter, in referring to *Lusthaus* v. *Commissioner,* 327 U. S. 293, states, at p. 750, as follows:

> "* * * In short, the opinion did not say that family partnerships are not be be regarded as partnerships for income tax purposes even though they be genuine commercial partnerships; the opinion did not even announce hobbling presumption under the income tax law against such partnerships."

And, continuing, at pages 753-754:

> "* * * It is not for this Court, by redefinition or the election of presumption, to amend the Internal Revenue Code so as to virtually ban partnerships composed of the members of an intimate family group.
>
> * * * * * * * * *

> In plain English, if an arrangement among men is not an arrangement which puts them all in the same business boat, then they cannot get into the same boat merely to seek the benefits of Sections 181 and 182. But if they are in the same business boat, although they may have varying rewards and varied responsibilities, they do not cease, to be in it when the Tax Collector appears."

It is significant to note that *Commissioner* v. *Culbertson,* 337 U. S. 733, was the last case decided by this Court under the rule of *Dobson* v. *Commissioner,* 320 U. S. 489. The *Culbertson* case having been decided by the Court of Appeals on June 30, 1948, prior to the amendment, effective September 1, 1948, of Section 1141 (a) of the Internal Revenue Code, was remanded back to the Tax Court for further consideration. Upon reconsideration, the Tax Court in an opinion by Judge Disney, 9 T. C. Memo. Dec. 647, although speaking the language of this Court's decision failed to apply its principle and Culbertson on second appeal to the Court of Appeals (*Culbertson* v. *Commissioner,* 5 Cir., 194 F. 2d 581, the Court of Appeals applying this Court's decision reversed the Tax Court and the Commissioner did not see fit to seek certiorari again. Similarly in the case at bar, lip service to the decision of this Court in the *Culbertson* case, *supra,* has been made but its principles ignored. The fact that the agreement between the partners gave petitioner a salary of $20,000 per annum comes within what this Court may have inferred in the question left unanswered at page 748. The subsequent amendment of the Internal Revenue Code by Sec. 191 did no more than the partners in the instant case had already done.

Hartz v. *Commissioner,* 8 Cir., 170 F. 2d 313, certiorari denied, 337 U. S. 959, by this Court simultaneously with *Commissioner* v. *Culbertson, supra,* was decided by the

Court of Appeals October 27, 1948, after the effective date of the amendment of Sec. 1141 (a) I. R. C., and this Court, in denying certiorari, did not remand the case to the Tax Court for reconsideration. In view of the holding of the Court of Appeals in *Hartz* v. *Commissioner, supra,* (where, at p. 318, it stated: "* * * Concluding, as we have, that this record compels the conclusion that this was a valid partnership, the Tax Court had no right to re-apportion the income of the partnership between the partners for tax purposes"), and the failure to remand the case in contrast to the *Culbertson* case, it is a reasonable conclusion that this Court upon consideration of the question of the power of the Commissioner to rewrite the agreement of the partners as to the division of profits in a bona fide partnership, would hold in the negative, in line with the Fifth[5], Sixth[6] and Eighth[7] Circuit Courts of Appeal and not follow the decision of the court below.

C. *The Questions in This Case Are of Nation-Wide Interest.* Respondent states that because of the 1948 Revenue Act permitting husband and wife division of income and the 1951 enactment, the question presented by this appeal has lost its nation-wide interest.

This argument fails to observe that petitioner's wife was not made a partner. If petitioner's only purpose was to deflect income from himself then, certainly, it would have been advantageous to have made his wife a partner, for in those years a husband could not merely by filing a joint return with his wife, divide his income in half for tax computation, as at present. Moreover, the 1951 Act in no way eliminates the problem between a father-in-law and his sons-in-law, brothers and sisters, brothers and brothers-in-law, or others not expressly provided for by the 1951

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[5] *Marcus* v. *Commissioner,* 201 F. 2d 850, 853.
[6] *Canfield* v. *Commissioner,* 168 F. 2d 907, 913.
[7] *Hartz* v. *Commissioner,* 170 F. 2d 313.

Act, and the approval by this Court of the usurped power of the Commissioner to substitute his judgment for that of the contracting parties' merely because of a family relationship, would continue to spread.

CONCLUSION

It is respectfully submitted, that because (a) the power asserted by the Commissioner of Internal Revenue is not supported by any authority (b) the conflict of decisions in the Court of Appeals for the various circuits (c) the general importance to the public of the question involved, that there is presented a proper occasion for the exercise of the supervisory power of this Court.

December, 1953.

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